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Sexual Harassment in Sports: How "Adequate" is Title IX?

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COMMENT

SEXUAL HARASSMENT IN SPORTS: HOW "ADEQUATE" IS TITLE IX?

I. INTRODUCTION

Title IX has had a tremendous impact on women. One important benefit of Title IX is the impact it has had on women's participation in sports. It has been called the "landmark legislation that bans sex discrimination in schools in both academics and athletics."[1] Despite its positive impact, however, discrimination still occurs, leaving those victimized to turn to the courts for a remedy. Unfortunately, in some circumstances, Title IX is inadequate in providing an athlete with a claim or an adequate remedy.

Ultimately, because of Title IX's inadequacies, and because of the impact that sexual discrimination has on athletes, it is important to have courts properly define and explain what Title IX protects, as well as the remedies that are available. Courts need to better explain the concept of sexual discrimination. Courts ultimately need to hold that even unintentional discrimination constitutes sexual harassment under Title IX, allowing those that are victimized to recover damages.

An example of such an inadequacy is when unintentional discrimination occurs in the coach-athlete relationship. Common examples of unintentional discrimination are when a coach positions a player to show him or her a "correct" stance or when an athlete submits to a massage. While such conduct by a coach may appear necessary and appropriate in the sports context, an athlete may feel demeaned if it proves to be unnecessary or excessive physical contact.

Another example is the use of derogatory, gender-based statements so as to motivate a player or team. This is an example of sexual discrimination that is considered accepted discrimination in the athletic realm because it is not, in and of itself, considered to amount to intentional discrimination.

In either situation, an athlete who has been victimized must be allowed to state a claim that allows for an appropriate remedy. This comment will explore the applicability of Title IX to the context of the coach-athlete

1. 145 CONG. REC. H6400 (daily ed. July 26, 1999) (statement of Rep. Schakowsky).

relationship. It will examine the limitations of the current paradigms, proposing that a broader conceptualization of sexual harassment, which includes the imposition of sexual stereotypes or sexual shame by a coach, to provide a more nuanced framework for assessing whether seemingly benign or paternalistic behavior constitutes sex discrimination.

II. BACKGROUND

Congress passed Title IX of the Educational Amendments in 1972. Title IX states:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [federal aid]."[2] The statutory purpose for Title IX is to prevent discriminatory practices and protect individuals against discrimination.[3] Title IX has become the cornerstone that protects female athletes by prohibiting educational programs, including athletics, which receive federal funding from discriminating on the basis of sex.[4]

Regrettably, the legislative history concerning Title IX's coverage of intercollegiate sports is vague.[5] The federal agency responsible for developing Title IX regulations, the Department of Health, Education, and Welfare (HEW), ended the ambiguity over coverage of athletics by ruling that, although few college or university athletic departments directly received federal funds, Title IX would extend to intercollegiate sports.[6] Historically, Title IX lawsuits involving intercollegiate athletics have been filed by female plaintiffs seeking to gain equal access, funding, or opportunities in women's athletics.[7] Sexual harassment by teachers or coaches is likewise actionable under Title IX.

Since Title IX's enactment, the number of opportunities for female athletes to participate in organized sports at all levels has dramatically

2. Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a) (2000).

3. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

4. *See* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 2 (1992).

5. *See* MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS 112 (1996).

6. *See id.* at 166.

7. *See, e.g.*, Deli v. Univ. of Minn., 863 F. Supp. 958, 963 (D. Minn. 1994); Harker v. Utica Coll. of Syracuse Univ., 885 F. Supp. 378, 392 (N.D.N.Y. 1995); Cohen v. Brown Univ., 101 F.3d 155, 179-80 (1st Cir. 1996); Bedard v. Roger Williams Univ., 989 F. Supp. 94, 96 (D.R.I. 1997).

increased. [8] Additionally, although Title IX applies only to educational institutions, the increase in high school and college athletics has created a pool of talent.[9] Even so, the increase of female athletes participating in sports is only partially successful.

Title IX leaves unresolved the issue of how women should be treated once they get on the field. Ultimately, Title IX's declaration of equal opportunity for females in athletics is deceptive. For example, while mandating formal equality by ensuring that male and female athletes have equal training facilities and equal funding, Title IX implicitly presumes that the structure of women's sports should be modeled after men's sports.[10] Amalgamation of a male structure within women's sports encourages women to replicate behaviors prevalent in male-dominated sports, failing to give consideration to the experiences of female athletes that often deviate from those of their male counterparts, such as the vulnerability to sexual harassment.[11]

III. SEXUAL HARASSMENT OF FEMALE ATHLETES DEFINED

Sex-based harassment, otherwise referred to as sex discrimination, of students is a real and serious problem in education at all levels. The phrase "sex-based harassment" refers to both the traditional notion of sexual harassment and sex-based harassment.

Although it does not involve intercollegiate athletics, *Franklin v. Gwinnett County Public Schools*[12] marks the Supreme Court's recognition that sexual harassment constitutes sex discrimination under Title IX.[13] In *Franklin*, a female student filed an action under Title IX against a school district and administrators, after being subjected to sexual harassment from a sports coach employed by the school district.[14] Relying on *Meritor Savings Bank v.*

8. *See* Women's Sports Foundation, *Women's Sports & Fitness Facts & Statistics, at* http://www.womensportsfoundation.org/binary-data/WSF_ARTICLEpdf_file/28.pdf (last visited Nov. 8, 2003) [hereinafter *Women's Sports Foundation*].

9. *See id.*; *see also* Brad Parks, *Not Just an Old Boys' Club; Women's Pro Leagues Make Bid for the Big Time*, WASH. POST, Oct. 20, 1996, at A1; Peter Brewington, *Women Attack Crowded Field: Games to Begin in Spring 2001 for 8-10 Teams*, USA TODAY, Feb. 16, 2000, at 14C; Mark Zeigler, *In WUSA, Women's Soccer Turns Pro*, S.D. UNION-TRIB., Feb. 19, 2000, at D1; Kim Horner, *A Field of Football Dreams: Newly Created League for Women Holds Tryouts at Local Park*, DALLAS MORNING NEWS, Aug. 13, 2000, at 43A.

10. *See* Shari L. Dworkin & Michael A. Messner, *Just Do . . . What?: Sport, Bodies, Gender, in* REVISIONING GENDER 341 (Myra Marx Ferree et al. eds., 1999).

11. *See Id.* Celia Brackenridge & Sandra Kirby, *Playing Safe: Assessing the Risk of Sexual Abuse to Elite Child Athletes*, 32 INT'L REV. SOC. SPORT 407, 412 (1997).

12. 503 U.S. 60 (1992).

13. *Id.* at 75.

14. *Id.* at 63-64.

Vinson,[15] the *Franklin* Court stated that Title VII standards for sexual harassment in the workplace should apply in a school setting.[16] Subsequent to *Franklin*, when asserting sex discrimination based on sexual harassment, a student-athlete must prove:

> (1) that [s]he is a member of a protected group; (2) that [s]he was subject to unwelcome harassment; (3) that the harassment was based on sex; (4) that the sexual harassment was sufficiently severe or pervasive so as unreasonably to alter the conditions of [her] education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[17]

Courts have struggled with defining what constitutes harassment "based on sex" within a Title IX sexual harassment claim, sufficient for a quid pro quo or hostile environment claim; and determining the scope of the institution's liability for the harassing conduct of one of its employees.

Recently, the Supreme Court addressed the latter question, delineating a specific standard for institutional liability when employees conduct themselves in a harassing manner. In *Gebser v. Lago Vista Independent School District*,[18] the Court recognized that while Title VII standards are applicable for certain elements of Title IX claims, Title VII would not define the contours of a school's liability for the conduct of its employees.[19] Rather, the Court followed Title IX's express remedial scheme, holding that a school was not liable for sexual harassment because no one with authority to take corrective action had actual notice of the harassment.[20] This standard applies at the secondary and post-secondary levels of education to harassing conduct by teachers, administrators, and coaches.[21] Although the Supreme Court articulated a standard for institutional liability under *Gebser*, the definition of actionable, hostile harassment "based on sex" under Title IX in an educational setting is less clear, particularly when the allegations concern a coach's conduct toward a female athlete.

Since its enactment, few Title IX decisions have addressed harassment between a coach and a student athlete where harassment is an issue; reported cases most often involve relationships at the grade school and high school

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15. 477 U.S. 57 (1986).

16. *Franklin*, 503 U.S. at 75.

17. Morse v. Regents of Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998) (citing Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996)).

18. 524 U.S. 274 (1998).

19. *Id.* at 286-87.

20. *Id.* at 290.

21. *See, e.g.*, Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 328 (S.D.N.Y. 1999).

levels.[22] However, female college athletes are reporting more and more incidents of sexual harassment by their male coaches.[23] One of the most high-profile cases involves allegations made by two members of the women's soccer team at the University of North Carolina against their coach, Anson Dorrance.[24] In *Jennings v. University of North Carolina,*[25] players brought a claim against the University of North Carolina at Chapel Hill and Anson Dorrance, alleging violations of the players' rights under Title IX.[26] Specifically, the players alleged that Dorrance had made "inappropriate and uninvited physical contact . . . ."[27] The case is currently in the state's attorney general office, where it has been for the past three years. It is not expected to reach trial for at least another year.[28]

Although concrete statistics on sexual harassment in women's sports are minimal,[29] one comprehensive study reported that forty percent of professional Athletes responding to a questionnaire indicated sexual abuse and harassment as issues in sport.[30] Such data has prompted some sports governing organizations to adopt guidelines and policies on sexual harassment.[31] While the suit against Dorrance gained national attention, in part because of his notoriety, sexual harassment of female college athletes in general appears to be an ever-increasing problem for which the "final recourse" is litigation under Title IX.[32]

The principles originating from Title VII hostile work environment and

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22. *See, e.g.*, Smith v. Metro. Sch. Dist. Perry Township, 128 F.3d 1014, 1016-17 (7th Cir. 1997); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 719-21 (6th Cir. 1996).

23. *See* Robin Finn, *Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES, Mar. 7, 1999, at A1.

24. *See id. See generally* S.L. Price, *Anson Dorrance, The Legendary North Carolina Women's Soccer Coach, is Sure He Understands What Makes a Female Athlete Tick, and He Has 15 National Titles to Prove It: So Why are Two Former Tar Heels Suing Him for Sexual Harassment?*, SPORTS ILLUSTRATED, Dec. 7, 1998, at 86-103 (discussing Dorrance's personal and professional life as well as the lawsuit filed against him).

25. 240 F. Supp. 2d 492 (M.D.N.C. 2002).

26. *Id.* at 497.

27. *Id.* at 496.

28. *See* John T. Wolohan, *Hostile Witness: Administrators Risk Plenty by Failing to Acknowledge and Combat Sexual Harassment,* ATHLETIC BUS., Apr. 2003, at 32.

29. *See Conference Review: Women's Institute on Sport and Education Foundation*, 4 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 83, 92 (1995) [hereinafter *Women's Institute*].

30. *See* Dannette Dooley, The Dome of Silence: Sexual Harassment and Abuse in Sport; Sandra Kirby, Lorraine Greaves and Oleana Hankivsky 15 HERIZONS 37 (2001) (book review). *See also* Leslie Heywood, *Despite the Positive Rhetoric About Women's Sports, Female Athletes Face a Culture of Sexual Harassment*, CHRON. HIGHER EDUC., Jan. 8, 1999, at B4.

31. *See Women's Institute, supra* note 29, at 98; Finn, *supra* note 23, at A24.

32. Finn, *supra* note 23, at A1 (quoting Janet Justus, education director of the NCAA).

quid pro quo claims guide the courts in their assessment and finding of coach-athlete sexual harassment in the college or university setting. In the next section, the forms that sexual harassment can take will be explored, followed by a discussion of the implications of Title IX to the coach-athlete relationship. Further, the issues of direct sexual harassment versus subtle forms of sexual harassment will be explored.

A. Quid Pro Quo/Hostile Environment

Sexual harassment can take two forms: quid pro quo[33] or hostile environment.[34] Definitions, however, of quid pro quo and hostile environment sexual harassment borrow heavily from Title VII definitions of such sexual harassment in the employment context.[35] The Office of Civil Rights (OCR) defines quid pro quo harassment as an incident when "[a] school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."[36] In the sports

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33. Quid pro quo was the first theory of sexual harassment to develop. To establish a claim of quid pro quo sexual harassment, the plaintiff must show that a supervisor made an unwelcome demand on the basis of sex and that as a result of refusing the demand the plaintiff suffered, or reasonably feared she would suffer, adverse consequences if she refused. *See Meritor Sav. Bank*, 477 U.S. at 64-66.

34. The Court in *Meritor Sav. Bank,* held that, to be actionable, sexual harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank,* 477 U.S. at 67 (quoting Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1972)). In order to claim hostile environment harassment, the plaintiff must show the following: (1) that the conduct was unwelcome; (2) that it was based on sex; (3) that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment; and (4) that the employer is liable for the harassment. *Id.* at 67-70.

35. The Equal Employment Opportunity Commission (EEOC), the enforcement agency for Title VII, defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature[.]" 29 C.F.R. § 1604.11 (2003). The EEOC provides that such unwelcome conduct constitutes sexual harassment when:

> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

36. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FED. REG. 12,034, 12,038 (Mar. 13, 1997), *available at* http://www.ed.gov/legislation/FedRegister/announcements/1997-1/031397b.html (last visited Nov. 9, 2003) [hereinafter Sexual Harassment Guidance].

context, quid pro quo sexual harassment occurs when a coach grants or withholds benefits, such as a scholarship, starting position, or playing time, as a result of an athlete's willingness or refusal to submit to the coach's sexual demands.[37] Because the pressure may be either explicitly or implicitly made a term or condition of the individual's scholarship, starting position, or playing time, the critical point is not whether the victim submits voluntarily, but whether the athlete submits to unwanted conduct.[38]

Hostile environment sexual harassment is defined as sexually harassing conduct by "[school] employees[,] other student[s], or third part[ies]" that "is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."[39] Again, in the sports context, hostile environment sexual harassment exists when a coach's conduct is so severe that it creates a hostile environment that interferes with the athlete's ability to perform.[40] In determining whether the coach's conduct is severe enough to constitute hostile environment sexual harassment, it does not matter if the harasser's behavior is deliberate or simply has the effect of creating an offensive atmosphere.[41] Since hostile environment sexual harassment is motivated by the victim's sex, it is based on sexual gestures, language, or activities.[42] An example of hostile environment sexual harassment would be unwelcome verbal expressions that are sexual in nature. This includes graphic sexual commentaries about a person's body or dress, the use of sexually degrading language, jokes, or sexually suggestive objects, pictures, video tapes, audio recordings, or literature placed in the work or practice area, which may embarrass or offend an individual.[43]

B. The Implications of Title IX to the Coach-Athlete Relationship

In the context of the coach-athlete relationship, acts that constitute sexual harassment may take a variety of forms. The following are just a few examples of the kind of acts that may constitute sexual harassment by coaches: (1) unwelcome sexual propositions, invitations, solicitations, or flirtations; (2)

37. *Women's Sports Foundation, supra* note 8, *at* http://www.womensportsfoundation.org (last visited Mar. 15, 2003).

38. Sexual Harassment Guidance, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Id.*

42. BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 30-31 (1992).

43. *Id.*

threats or insinuations that an athlete's scholarship opportunities, athletic assignments, or academic grades may be adversely affected by not submitting to sexual advances; (3) unwelcome verbal expressions of a sexual nature, including graphic sexual commentaries about a person's body, dress, appearance, or sexual activities; (4) unwelcome use of sexually degrading language, jokes, or innuendoes; (5) unwelcome suggestive or insulting sounds or whistles; (6) sexually suggestive objects, pictures, videotapes, audio recordings or literature, placed in the work or practice area, which may embarrass or offend individuals; (7) unwelcome and inappropriate touching, patting, or pinching; (8) obscene gestures or obscene phone calls; or (9) consensual sexual relationships where such relationships lead to favoritism of one athlete with whom the coach or teacher is sexually involved and where such favoritism adversely affects other athletes.

Because of the various types of acts that may constitute sexual harassment, athletic administrators need to be particularly aware of the potential for sexual harassment of athletes, especially when considering that (1) more men are coaching female athletes today than ever before; and (2) damages are available for victims of deliberate Title IX discrimination.

An ironic consequence of Title IX that adds to the potential problem of sexual harassment is that, while the number of females participating in high school and college athletics has increased, the number of women coaches has decreased.[44] In 1972, before the enactment of Title IX, over 90% of all college female athletes were coached by women.[45] In 1994, the number of college female athletes being coached by women had dropped to 49.4%.[46] Due to this increase of men coaching female athletes, the opportunity and possibility of sexual harassment has increased. It is important to note, however, that male coaches are not the sole wrongdoers sexually harassing athletes. Female coaches are also guilty of the same actions.

In 1980, when the Second Circuit Court of Appeals decided *Alexander v. Yale University,*[47] the true scope of Title IX was unknown. *Alexander* was the first case to address the issue of sexual harassment of students under Title IX. In *Alexander*, five current and former students sued Yale University, alleging

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44. Maureen R. Weiss & Candie Stevens, *Motivation and Attrition of Female Coaches: An Application of Social Exchange Theory*, SPORT PSYCHOLOGIST, Sept. 1993, at 244-261; *see also* Cynthia A. Hasbrook et al., *Sex Bias and the Validity of Believed Differences Between Male and Female Interscholastic Athletic Coaches*, 61 RES. Q. EXERCISE & SPORT 259-267 (1990).

45. D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF AMERICAN SPORT (5th ed. 1993).

46. R. Vivian Acosta & Linda J. Carpenter, *Women in Intercollegiate Sport. A Longitudinal Study - Nineteen Year Updated 1977-1996*, *at* http://bailiwick.lib.uiowa.edu/ge/Acosta/womensp.html (last visited Nov. 9, 2003).

47. 631 F.2d 178 (2d Cir. 1980).

that male faculty members and administrators sexually harassed them. The students further alleged that Yale was violating Title IX "by refusing to consider seriously women students' complaints of sexual harassment by male faculty members and administrators."[48] Title IX, which was passed to prohibit sexual discrimination at educational institutions that receive federal financial assistance, requires such institutions to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints."[49] The United States District Court for the District of Connecticut granted Yale's motion to dismiss against all of the students, except for one, based on the grounds that the other students had failed to state a claim establishing a violation of Title IX.[50] Additionally, the court determined that since the other students had graduated, their complaints were moot.[51] The remaining plaintiff, current student Pamela Price, argued that she received a poor grade in one of her classes as the consequence of her rejecting a professor's proposition to receive an "A" in exchange for submission to sexual advances.[52] After a trial on the issue, the court found that the alleged incident of sexual proposition never happened and that Price's grade reflected her work.[53]

On appeal, Ronni Alexander, another plaintiff in the case, argued that she abandoned her desired career to be a professional flutist after repeated sexual advances, which included coerced sexual intercourse with her instructor.[54] Alexander's complaint further alleged that she attempted to complain to officials about the harassing conduct, but was discouraged by uninterested administrators and ad hoc methods.[55]

Another plaintiff, Margery Reifler, alleged that the field hockey coach sexually harassed her, causing her to suffer distress and humiliation to her educational detriment.[56] Reifler further claimed that she was intimidated from complaining about the harassment due to the lack of legitimate procedures at Yale.[57] In rejecting the claims of Alexander and Reifler, the Court of Appeals for the Second Circuit upheld the district court's finding that as a result of the

48. *Id.* at 180.
49. Education, 34 C.F.R. § 106.8 (2003).
50. Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977).
51. *Alexander*, 631 F.2d at 184.
52. *Alexander*, 459 F. Supp. at 3-4.
53. *Id.*
54. *Alexander*, 631 F.2d at 181.
55. *Id.*
56. *Id.*
57. *Id.*

alleged harassment, the plaintiffs failed to establish an improper advance was made, leaving no grievance to be redressed by the court.[58] Having already graduated from Yale, the court found that it could not address Alexander's and Reifler's claims and give the requested relief by ordering Yale to promulgate effective procedures in handling sexual harassment complaints.[59] The court noted that Yale had adopted procedures to cure this problem, establishing grievance procedures for hearing future sexual harassment complaints.[60] In essence, the issue was moot. The court held that in a suit under Title IX, the deprivation of "educational" benefits empowers the courts to provide relief.[61] When the alleged injury relates to an activity removed from the ordinary educational process, the court noted that a more detailed allegation of injury was required.[62] A successful career as a flutist, athlete, or manager of a women's field hockey team, are activities removed from the ordinary educational process.[63] Finally, as related to Alexander's and Reifler's personal injuries, the court concluded that those claims were too speculative in nature to provide relief.[64]

Although the court rejected the plaintiffs' claims in *Alexander*, the its holding is important because it upheld the district court's finding that sexual harassment of students was prohibited under Title IX.[65]

The legislative history of Title IX suggests that it was not originally intended to impose gender equity requirements on specific programs and departments unless they received direct federal funding.[66] The United States Supreme Court also believed that to be the correct interpretation when in *Grove City College v. Bell,*[67] the Court held that only those programs within the institution directly receiving federal funds should be subjected to Title IX.[68] This "programmatic approach"[69] effectively stripped Title IX of its power to enforce gender equality in federally funded institutions. Dissatisfied with the Supreme Court's interpretation of Title IX in *Grove City College*,

58. *Id.* at 183.
59. *Alexander,* 631 F.2d at 184.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Alexander,* 631 F.2d at 184-85.
65. *Id.* at 184.
66. T. Jesse Wilde, *Title IX: Gathering Momentum*, 3 J. LEGAL ASPECTS SPORT 71, 72 (1993).
67. 465 U.S. 555 (1984).
68. *Id.* at 570.
69. GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 420 (1988).

Congress enacted the Civil Rights Restoration Act of 1987.[70] Designed to give weight and authority to Title IX, the Act requires that if any program within the institution receives federal funds, the entire institution shall be covered by Title IX and other anti-discrimination laws.[71] By requiring an "institutional approach"[72] to Title IX, Congress extended the reach of Title IX into every activity, program, and department of an institution receiving federal funds.

Subsequently, in *Franklin v. Gwinnett County Public Schools,*[73] the issue of sexual harassment against students was brought before the United States Supreme Court when a high school student brought a Title IX action, seeking damages for alleged sexual harassment by a teacher. In *Franklin*, the plaintiff, a female high school student, filed suit against the district alleging that Andrew Hill, a coach and teacher at the high school, continually harassed her and that school officials failed to stop Hill's continued harassment.[74] The complaint further alleged that Hill initiated sexual discussions with Franklin, questioning Franklin about her sexual experiences with her boyfriend; that Hill forcibly kissed Franklin on the school grounds; and that on a few occasions, Hill interrupted class and requested that Franklin be excused, taking her to a private office where he subjected her to coercive intercourse.[75]

Franklin further alleged that even though school officials investigated and knew of Hill's sexual harassment of her and other female students, school administrators took no action to halt Hill's sexual harassment.[76] In fact, school administrators tried to discourage Franklin from pressing charges against Hill.[77] The principal of the high school closed his investigation into Franklin's allegations when Hill resigned.[78] Hill's resignation at the end of the school year was premised on the condition that all matters pending against him would be dropped.[79]

In August 1988, Franklin filed a complaint with the Department of Education's Office of Civil Rights (OCR),[80] alleging that she had been subject

70. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

71. *Id.*

72. WONG, *supra* note 69, at 420.

73. 503 U.S. 60.

74. *Id.* at 63-64.

75. *Id.*

76. *Id.* at 64.

77. *Id.*

78. *Franklin,* 503 U.S. at 64.

79. *Id.*

80. Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 619 (11th Cir. 1990).

to sexual harassment in violation of Title IX. Following a six-month investigation, the OCR found that the Gwinnett school district violated Title IX. In particular, the OCR found that the Gwinnett school district violated Franklin's rights by subjecting her to physical and verbal sexual harassment, and by interfering with her right to complain about such conduct.[81] However, the OCR failed to act and closed its investigation after being assured that the school district would implement a grievance procedure to prevent future violations.[82] Disappointed with the outcome of the OCR's investigation, Franklin filed a Title IX lawsuit in federal district court, seeking damages against the Gwinnett County School District.

The United States District Court for the Northern District of Georgia dismissed Franklin's suit on the ground that Title IX does not authorize an award of monetary damages.[83] On appeal, the Eleventh Circuit Court of Appeals affirmed the district court, holding that while it was undisputed that an implied private right of action existed under Title IX, an action for monetary damages could not be sustained for an alleged intentional violation of Title IX.[84] In justifying its holding, the Eleventh Circuit Court noted that Title IX was Spending Clause legislation, therefore, it could not allow for the recovery of compensatory relief where Congress had not expressly provided for such a remedy until Congress or the Supreme Court acted on the issue.[85]

In reversing the lower courts, the Supreme Court held that unless Congress expressly indicates otherwise, all appropriate remedies are available to the plaintiff.[86] The Court noted that federal statutes empower the federal courts to use any remedy available to protect legal rights.[87] The Court further held that it was not the intent of Congress to limit the available remedies in a Title IX suit.[88] On the issue of damages, the Court found that the Gwinnett County Schools had a duty under Title IX not to discriminate on the basis of sex and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[89] The Court concluded that the same rule should be applied when a teacher or coach

81. *Franklin*, 503 U.S. at 64 n.3.

82. *Franklin*, 911 F.2d at 619.

83. Franklin v. Gwinnett County Pub. Schs., 407 S.E.2d 78, 80 (Ga. Ct. App. 1991).

84. *Franklin*, 911 F.2d at 622.

85. *Id.*

86. *Franklin*, 503 U.S. at 64-65.

87. *Id.* at 71-73.

88. *Id.* at 75.

89. *Id.* at 75 (quoting *Meritor Sav. Bank*, 477 U.S. at 64).

sexually abuses and harasses a student.[90] Finally, the Gwinnett County Schools argued that the remedies available under Title IX should nevertheless be limited to back pay and prospective relief. The Supreme Court, however, rejected this argument and concluded that damages were available for victims of deliberate Title IX discrimination.[91]

After the Supreme Court's ruling in *Franklin*, Title IX has taken on a new force. Prior to *Franklin*, if school principals or administrators knew of an improper relationship between a student and coach, they had two options. They could either (1) ignore the problem and hope it would go away, or (2) discipline the coach. The Supreme Court's ruling in *Franklin* has signaled to administrators that they must now take a proactive approach. If they do not, they could find themselves facing a Title IX lawsuit similar to Gwinnett County Public Schools.

Additionally, with the compensatory damages awarded in the *Franklin* case in 1992, Title IX has turned "from a purely protective statute into an offensive weapon."[92] No longer does a plaintiff have to tolerate sexual harassment by a teacher or coach. If the school fails to act, the plaintiff can now sue to collect compensatory damages for any deliberate violations of Title IX. The plaintiff no longer must show that the coach's sexual harassment caused him or her to suffer a "severe psychological injury." A plaintiff can win a sexual harassment suit if they can demonstrate that they were subjected to a hostile or abusive environment.

Therefore, if a coach subjects an athlete to a hostile or abusive environment by making sexual innuendoes toward the athlete or by making unwelcome sexual propositions, invitations, solicitations, or flirtations, the coach and school are in violation of Title IX and are in danger of facing a lawsuit. However, while there is little disagreement that sexual harassment has a negative impact upon athletes, there is much disagreement as to what constitutes harassment. The next section examines different conceptions of harassment.

1. Male Touching of Female Athletes

Because only unwelcome sexual conduct violates Title IX, sexual relationships between coaches and athletes are not a per se violation of Title IX. "Conduct is unwelcome if the student did not request or invite it" and is

90. *Id.*

91. *Franklin*, 503 U.S. at 73-75.

92. Glenn M. Wong & Carol Barr, *Title IX Wields a Mightier Sword*, ATHLETIC BUS., May 1992.

offensive to the victim.[93] Additionally, just because the athlete may not report the conduct immediately does not mean that the conduct was welcome.[94]

In *Meritor Savings Bank v. Vinson,*[95] the Supreme Court first addressed the issue of unwelcomeness as an element of a sexual harassment case. In *Meritor Savings Bank,* it was concluded that the sexual relationship between Vinson and her supervisor was voluntary.[96] The Court expanded the scope of liability to include "voluntary" sexual relationships regardless of whether or not it was directly linked to the granting or denying of a job benefit.[97] In essence, "voluntariness" is not a defense to sexual harassment claims.

Because the burden is on the victim of sexual harassment to show that the conduct was unwelcome, the "unwelcomeness" requirement, when applied to Title IX cases, is problematic;[98] hence, the presumption that most sexual relationships are consensual should not apply in high-school and college athletic situations. For instance, schools should be particularly concerned with this issue because athletes may be encouraged to believe that the coach has absolute authority over the success of their athletic career, while in school. The athlete may fear that the objection to the harassment will not be effective in stopping the harassment, or the athlete may feel that he or she will be singled out for retaliation. Because factors such as power and control come into play in a coach-athlete relationship, to remove the possibility of a female athlete "freely" giving consent to a sexual relationship or to freely turn it down, the burden should be placed on the coach to show the welcomeness. However, as the law currently stands, the "unwelcomeness" concept presumes that when an advance is made, the recipient is fully capable in turning it down; thus, there is no harm in asking. Nevertheless, factors such as power, trust, and control that characterize the coach-athlete relationship may remove the possibility of a female athlete freely giving consent to sexual contact or to freely turn it down.[99]

Additionally, because the "unwelcomeness" concept was first developed under Title VII sexual harassment law, the "unwelcomeness" concept is not a perfect fit when dealing with Title IX sexual harassment claims. For example,

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93. Sexual Harassment Guidance, *supra* note 36, at 12,040.

94. *Id.*

95. 477 U.S. 57.

96. *Id.* at 68.

97. *Id.*

98. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases,* 72 N.C. L. REV. 499, 503-05 (1994).

99. *See* PETER RUTTER, SEX IN THE FORBIDDEN ZONE: WHEN MEN IN POWER – THERAPISTS, DOCTORS, CLERGY, TEACHERS AND OTHERS – BETRAY WOMEN'S TRUST 25 (1986).

a coach, not unlike a work supervisor, is an authority figure who exercises some control over a subordinate; however, the nature and extent of the control is very different. A supervisor is a colleague whose control is generally limited, occurring only during business hours. Additionally, the supervisor and the employee are generally both adults, leaving little concern that the age of the employee is a relevant factor contributing to the sexual relationship.

In contrast, coaches occupy a position of power and control over both high school and college level athletes. Additionally, there is a great deal of trust within a coach-athlete relationship, and a coach's control extends to all aspects of the athlete's life.[100] The athlete's perception of this relationship is often characterized by both emotional and physical dependence. For example, a coach offers tangible rewards, such as competitive opportunities, as well as determination of punishment, such as withdrawing scholarships.[101]

The desire for athletes, in a coach-athlete relationship, to exercise personal control within this reward-punishment system renders such athletes vulnerable to embryonic sexual behavior. Additionally, because of the power imbalance in a coach-athlete relationship, as well as the age disparities, the vulnerability of the athlete to be subjected to a sexual relationship is increased.[102] For example, high school and college athletes are typically younger than their coaches and are therefore more likely to be enticed into inappropriate sexual relationships with them. For younger athletes, the lack of decorum of such relationships is beyond question,[103] while the plausibility of a consensual coach-adult athlete relationship is challenged by the element of power imbalance in the coach-athlete relationship.

The nature of coach-athlete, sexual relationships should be presumed to be non-consensual, with the burden placed on the coach to prove that the conduct was "welcome," rather than requiring the athlete to prove that the conduct was "unwelcome." The shift in this burden would, at the very least, help equalize the power imbalance.

While the power and trust prevalent in a coach-athlete relationship affects both male and female athletes, female athletes are more susceptible to being influenced into having a sexual relationship with their coach than male athletes. In particular, this is true because female athletes are more likely to be

100. *See* Alan Tomlinson & Ilkay Yorganci, *Male Coach/Female Athlete Relations: Gender and Power Relations in Competitive Sport*, 21 J. SPORT & SOC. ISSUES 134, 143-44 (1997).

101. Celia Brackenridge & Kari Fasting, *Background Studies on the Problem of Sexual Harassment in Sport, Especially with Regard to Women and Children, report prepared for 9th Council of Europe Conference of Ministers Responsible for Sport* (2000), *at* http://culture.coe.rf/sport/conf/eng/msl9.3htm (last visited Mar. 2, 2003).

102. *Id.*

103. *See, e.g.*, Scadden v. Wyoming, 732 P.2d 1036, 1039 (Wyo. 1987).

coached by males than male athletes are to be coached by females.[104] However, this is not to say that male athletes are never subjected to sexual harassment by a coach, nor does it say that female coaches do not subject male athletes to sexual harassment.[105]

The difficult problem of setting the boundaries of appropriate physical touching between male coaches and female athletes must also be addressed. This is another area in which the experiential perceptions of female athletes may deviate from male athletes.

While a certain amount of physical touching between a coach and an athlete is accepted and even considered necessary in many sports, such touches may still be considered harassment, or unintentional discrimination. For example, while it may not be considered harassment when a coach positions a player to demonstrate the correct posture for a defensive move, it may be considered harassment when a coach massages an athlete. However, because male dominated sports operate on a heterosexual presumption,[106] such touches are considered to be non-sexual.[107] This presumption fails to take into consideration when there is a male coach and a female athlete.

In *Oncale v. Sundowner Offshore Services, Inc.*,[108] the Supreme Court revisited the issue of what constitutes sexual harassment. In *Oncale*, the plaintiff, Joseph Oncale, was a homosexual oilrig worker who was sexually harassed by his co-workers.[109] Oncale alleged that on several occasions he was "forcibly subjected to sex-related, humiliating actions."[110] Although the case involved the application of Title VII sexual harassment law to instances of same-sex harassment, the Court's opinion expressed the necessity to look at all the surrounding circumstances of each sexual harassment claim.[111] The Court stated that viewing the harassment claim within the social context is key to determining when the conduct that is being asserted is simply "teasing or roughhousing . . . [or] conduct which a reasonable person in the plaintiff's

104. Acosta & Carpenter, *supra* note 46. *See* Marc Bloom, *When Athletes Are One Sex, and Coaches Are the Other*, N.Y. TIMES, June 13, 1999, at 15, 20.

105. *See* MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS 186, 188-89 (1994).

106. *See* BRIAN PRONGER, THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX 9 (1990) (describing the effect of the heterosexual presumption on gay male athletes).

107. *Id.*

108. 523 U.S. 75 (1998).

109. *Id.* at 77.

110. *Id.*

111. *Id.* at 79-80.

position would find severely hostile or abusive."[112]

Harassment law operates on a presumption of sexual desire.[113] Thus, when a supervisor makes sexual advances toward a subordinate, harassment law presumes that the supervisor is heterosexual and such attention would not have been directed towards a person of the same sex.[114] Such presumptions, however, are not the behavioral norm within the realm of the coach-athlete relationship. In the coach-athlete relationship, the presumption is that such conduct is non-sexual in nature.

As a result of the incongruence between the athletic presumption that touches are non-sexual and the harassment presumption that touches are sexual, when a touch does occur between a coach and an athlete, conflicting messages are communicated.[115] For example, one of the allegations in *Ericson v. Syracuse University*[116] was that the coach sexually harassed former members of the university women's tennis team by giving them massages that were sexual in nature.[117] The former members brought suit against the university and its officials based on allegations that their former coach sexually harassed them over approximately a three-year period, and that some or all of those who investigated and heard the charges against the coach not only had actual notice that the coach had been harassing female student-athletes for a period of twenty years, but also conspired to conduct a "sham" investigation and hearing in order to conceal the full extent of the coach's misconduct.[118] Irrespective, because the athletic presumption proposes that such touches are within the realm of appropriate touching, Title IX has no solution for this problem.

The response to this problem can affect the type of training women receive. A coach may react by treating female athletes differently than the

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112. *Id.* at 82.

113. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692-1710 (1998) (arguing that the prevailing paradigm of sexual harassment law is based on a sexual desire-dominance paradigm that presumes that a male supervisor's advances toward a female subordinate are based on sexual desire because the supervisor would not make similar sexual advances toward a man); Katherine M. Franke, *What's Wrong With Sexual Harassment*, 49 STAN. L. REV. 691, 734-35 (1997) (arguing that sexual harassment should not be understood merely as an expression of sexual desire but as an expression of sexism).

114. *See* Franke, *supra* note 113, at 736.

115. *See* Todd Taylor, *Men Coaching Women Deal With Pitfalls: Dorrance Case Putting Focus on Gender Issues*, GREENSBORO NEWS & REC., Sept. 4, 1998, at C1.

116. *Ericson*, 35 F. Supp. 2d 326.

117. *Id. See Former SU Tennis Players Discuss Sexual Harassment: Two Players Said Coach Dwire Gave Unwanted Massages*, SYRACUSE HERALD-J., Dec. 5, 1997, at D1.

118. *Ericson*, 35 F. Supp. 2d at 328.

male athletes for fear of being accused of sexual harassment.[119] Ironically, the presumptions that operate in harassment law may, as a result, impede women's athletic advancement.

2. Subtle Forms of Harassment

Harassment of an athlete does not necessarily mean that a sexual relationship has to occur between the coach and the athlete. For example, a popular coaching technique, such as belittling a player, is a form of harassment. Sometimes the belittling can be gendered in nature (e.g., "you play like a girl"). In *Ericson*, in addition to complaints about unwanted sexual conduct, the players also complained about harassment of a non-sexual nature.[120] In support of their claim that the coach was harassing them in a non-sexual manner, the female athletes described occasions when the coach made demeaning comments about women.[121] For example, as part of a motivational speech, the coach referred to a brand of clothing, the Gap, and said that it stood for "Girls Are Pathetic."[122]

Conduct that may be described as sexual harassment, however, will not always create a hostile environment. For a hostile environment to exist, the conduct must have restricted a student's ability to participate in or benefit from education, or the conduct must have altered the condition of the student's educational environment.[123] In other words, the conduct must be considered in light of what a reasonable person knowing all the circumstances would find harassing.[124]

When determining the outcome of a Title IX sexual harassment claim, Title VII's reasonableness standard operates imperfectly in the context of athletics[125] because when judged in the social context of athletics, what may be considered "reasonable" in athletics may not be considered "reasonable" in a work environment.[126] Additionally, as previously discussed, the Court in

119. *See* Taylor, *supra* note 115 (discussing coaches' strategies to minimize risk of sexual harassment charges, including not meeting alone with female athletes and taking a different psychological approach to coaching women).

120. *See Ericson,* 35 F. Supp. 2d 326; Paul Riede, *Former Players Help Case Against SU Depositions, Accuse Tennis Coach Jesse Dwire of Sexual Harassment, Begun in '78*, POST STANDARD., Jan. 24, 1999, at A1.

121. Riede, *supra* note 120, at A1.

122. *Id.*

123. *Oncale,* 523 U.S. at 81.

124. *Id.* at 81-82.

125. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620-622 (6th Cir. 1986).

126. Some employers have argued that the social context of the workplace is relevant to the determination of what constitutes harassment. *See id.* at 622.

Oncale, looking at a sexual harassment claim via Title VII, stated that the statute fails to take into consideration the differences in the ways that men and women behave and interact with members of both sexes.[127] While some coaches consider an aggressive style of coaching necessary to motivate athletes,[128] some consider hazing necessary to build team loyalty.[129] Therefore, when viewing sexual harassment law within the contexts of athletics, courts must consider what the behavioral norm should be in athletics before basing decisions on what society thinks the norm should be.

An example is found in *Seamons v. Snow.*[130] Brian Seamons, a high school student, brought a Title IX sexual harassment claim against his school after he was tied naked in locker room by his football teammates and then shown to a female student. [131] After reporting the incident to the school, the football coach accused Seamons of betraying his teammates and told him to apologize. Upon Seamons refusal, the coach dismissed him from the team.[132]

In Seamons complaint, he alleged the following:

> that the [school's] response to that assault was sexually discriminatory and harassing. . . .[Contending] that the [school] expected him to conform to a macho male stereotype, as evidenced by their suggestion to him that he "should have taken it like a man." In addition, the coach reportedly explained the incident by stating "boys will be boys," and characterizing the assault as "hazing," or consistent with "pranks" that are rites of passage on the football team. [133]

The appellate court dismissed the complaint, holding that such actions that were taken by the school or school officials did not demonstrate that the school was motivated by intent to discriminate against Seamons on the basis of his sex.[134] As demonstrated by *Seamons*, it would be a reasonable inference to conclude that the aggressiveness that occurs in male athletics, where harassment is the norm, serves as a baseline for an already hostile

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127. *Oncale,* 523 U.S. at 81-82.

128. *See* Alexander Wolff, *Knight Fall: Bob Knight's Controversial 29-Year Reign at Indiana Came to an Ironic End When He Gave a Student an Unmannerly Lesson in Manners*, SPORTS ILLUSTRATED, Sept. 18, 2000. Bob Knight justified his aggressive tactics after his firing.

129. *See* Jamie Bryshun & Kevin Young, *Sport-Related Hazing: An Inquiry Into Male and Female Involvement, in* SPORT AND GENDER IN CANADA 269-92 (Philip White and Kevin Young eds., 1999).

130. 864 F. Supp. 1111 (N.D. Utah 1994).

131. *Seamons*, 84 F.3d at 1230.

132. *Id.* at 1230.

133. *Id.*

134. *Seamons,* 864 F. Supp. at 1118; *Seamons,* 84 F.3d at 1233.

athletic environment.

IV. THE INADEQUACY OF TITLE IX TO REMEDY THESE PROBLEMS

Although there is an additional problem of underreporting sexual harassment, Title IX is still inadequate to remedy the problems that are reported. Still, high-profile sexual harassment allegations against well-known coaches have focused attention on the problem of sexual harassment in sports.[135] University of North Carolina soccer players and Syracuse University tennis players, for example, accused their respective coaches of sexual harassment.[136]

In *Jennings v. University of North Carolina,*[137] referred to earlier, a North Carolina soccer coach, Anson Dorrance, was accused of inappropriate behavior, including making uninvited sexual comments.[138]

In *Ericson*, female tennis players accused their male coach of sexual harassment based on his giving of unwanted massages, sexist comments, and sex-related conversations.[139] As previously mentioned, the court found that while the players may have stated a claim for which relief could be granted, the presumption in athletics is that such touches, massages, are within the realm of appropriate touching.[140]

Unfortunately, there are no accurate statistics available recording the number of cases where an athlete has been sexually harassed by his/her coach. Furthermore, the Department of Education reports that only a small percentage of sexual harassment cases involving athletes by coaches are reported.[141]

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135. *See* Joe Mathews, *Compton Coach Charged With Molesting Player; Courts: Dominguez High Basketball Mentor Russell Otis, Who Has Strongly Denied Wrongdoing, Will Plead Not Guilty, His Lawyer Says*, L.A. TIMES, Nov. 18, 2000, at B1.

136. *Jennings,* 240 F. Supp. 2d at 492; *Ericson*, 35 F. Supp. 2d at 326.

137. 240 F. Supp. 2d 492.

138. *Id.*; *See* Gary Davidson, *N.C. Soccer Coach Denies Suit Charges*, USA TODAY, Aug. 26, 1998, at 1C (quoting athletic director Dick Baddour).

139. *Ericson,* 35 F. Supp. 2d at 327. *See* Riede, *supra* note 120, at A1.

140. *Ericson,* 35 F. Supp. 2d at 326.

141. *See, e.g.*, *Seamons*, 864 F. Supp. at 1123 (dismissing Title IX harassment suit against a school district because the alleged facts did not support the claim that actions were motivated by an intent to discriminate because of the victim's sex), *aff'd in part, rev'd in part*, 84 F.3d 1226 (10th Cir. 1996); Brzonkala v. Va. Polytechnic and State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (dismissing Title IX suit against the University because the plaintiff failed to allege facts to support the necessary discriminatory intent based upon sex), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000) (dismissing Violence Against Women (VAWA) claims as unconstitutional because Congress exceeded its powers under the commerce clause and enforcement clause of the Fourteenth Amendment); Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325, 336 (W.D. Pa. 1997) (denying motion for summary judgment of Title IX claim against school district because there were

However, when referring to the media accounts that are described in *Jennings* and *Ericson,* it is reasonably inferred that incidents of sexual harassment made by coaches occur more frequently than reported. Potential reasons for the underreporting are fear of punishment, fear that athletes may be retaliated against by their coaches who hold the key to their athletic success, or because athletes are uncertain when the line has been crossed.[142] What *is* clear, however, is if more athletes would come forward to report such misconduct by coaches, there would be no viable remedy under Title IX. Hence, it would be reasonable to conclude that if there was a viable remedy under Title IX that more cases of sexual misconduct by athletes would be reported.

Sexual harassment threatens an athlete's physical and emotional well-being, and the impact is even more substantial because of the amount of trust that an athlete has in the coach.[143] Because of the impact that sexual harassment has on those that are victimized, there needs to be changes in how courts assess Title IX complaints, properly defining and explaining what Title IX protects, as well as the remedies that are available.

V. A PROPOSAL FOR MORE EFFECTIVE PROTECTION

The difficult issues involve what training strategies should be used to coach women athletes, and how should the law evaluate coaching practices to better protect women athletes. These problems can be approached in two ways.

First, reformation of Title IX should expand the definition of sexual harassment to take into consideration the sex of the athlete and the differences that exist between men and women.[144] For example, some commentators argue that the way Title IX is currently structured focuses on whether the victim was sexually desirable to the harasser, rather than taking into account that the sexual harassment could stem from gender hostility.[145] When

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genuine issues of material fact); Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 921-22 (S.D. Ohio 1998) (granting summary judgment for Ohio State University on Title IX claims because plaintiff failed to present sufficient evidence of a hostile environment and quid pro quo sexual harassment); *Ericson*, 35 F. Supp. 2d at 330-31 (denying the defendant's motion for summary judgment of Title IX claims because the allegations support a claim).

142. *See* Robin Finn, *Public Hugs, Private Harm: Rise in Harassment Cases Accompanies Title IX Victory*, CHI. TRIB., May 26, 1999, at 8; Tomlinson & Yorganci, *supra* note 100.

143. *See* U.S. DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 1 (1999), *available at* http://www.ed.gov/print/about/offices/list/ocr/docs/ocrshpam.html (last visited Nov. 9, 2003); Brackenridge & Fasting, *supra* note 101.

144. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation Of Sex From Gender*, 144 U. PA. L. REV. 1, 1-2 (1995).

145. Schultz, *supra* note 113 at 1696.

considering that what often constitutes harassment in the workplace deviates from what constitutes harassment on the field, it is necessary for the legislature and courts to consider "all the circumstances," including gender, taking into account that being involved in sports does not mean consenting to a hostile environment.

Second, coaches need to change their attitudes toward sports, ensuring that the accepted behavior is non-hostile. By changing the attitudes of coaches and altering their coaching techniques, it is possible for the game to remain the same without the hostility and harassment that is currently present. Coaches need to understand that it is necessary to take into consideration the multiple identities and viewpoints of women,[146] as well as understand that aggressiveness is not always the answer.[147]

Coaches need to be aware of their actions and determine whether education or winning is the primary goal. While winning athletic competitions has seemingly become more important than learning, especially at the college level because of the commercialization of athletes, the core principle of educational institutions covered by Title IX is learning. By altering coaches' thinking patterns, it is possible to reiterate the core principle of learning, thereby encouraging coaches to use alternative training techniques, limiting the possibility for harassment to occur.

As this paper demonstrates, because of the confusion of what constitutes sexual harassment, Title VII is far from a perfect fit for Title IX cases. First, what constitutes sexual harassment, as well as the standard that is applied to determine whether harassment has in fact occurred, is too tailored after Title VII. Second, Title IX does not adequately take into account the uniqueness of the coach-athlete relationship. Furthermore, while the Court has determined that monetary damages are available in a Title IX action,[148] the issue of an adequate remedy for unintentional discrimination has yet to be determined.

Courts have a unique opportunity to construct a more protective sexual harassment law under Title IX. For the law to capture the nuances of harassment that female athletes face, however, it must challenge what society believes the behavioral norm should be in sports, as well as the thinking patterns of coaches. Additionally, courts must set a standard that protects the athlete from unwelcome sexual discrimination, such as unintentional discrimination, constructing a more rigorous Title IX that provides an athlete

146. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 302 (1991).

147. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 94-105 (1995).

148. *See Franklin*, 503 U.S. at 60.

with a claim and an adequate remedy.

VI. CONCLUSION

Sexual harassment of students is a serious problem that cannot be ignored by school administrators. In sports, sexual relationships between athletes and coaches "are so commonplace that many athletes see them as normal."[149] However, because of how courts and legislatures are beginning to view Title IX, the day of student athletes having to tolerate a coach's unwanted sexual advances or language are becoming extinct. Failure to provide an environment free of hostile or abusive behavior may prove costly.

It is essential that athletic departments understand the concept of sexual harassment in order to set policies regarding coach-athlete relationships and avoid a sexual harassment lawsuit. Although the true effect Title IX will have on preventing sexual harassment of students-athletes has yet to be tested in the courts, schools and athletic administrators must be made aware of the fact that sports are not immune from sexual harassment laws. Hence, administrators need to take a more proactive role in preventing sexual harassment.

Erika Tripp

149. Helen Lenskyj, *Unsafe at Home Base: Women's Experiences of Sexual Harassment in University Sport and Physical Education*, 1 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 19-33 (1992).